

Before the
Administrative Hearing Commission
State of Missouri



KITTIE WAGNER,)	
)	
Petitioner,)	
)	
vs.)	No. 13-1650 BN
)	
STATE BOARD OF NURSING,)	
)	
Respondent.)	

DECISION

We renew¹ Kittie Wagner’s license as a registered nurse (“RN”) subject to the same terms of probation as issued by the State Board Nursing (“Board”) in its order of September 3, 2013.

Procedure

Wagner filed a complaint on September 17, 2013, appealing the Board’s issuance of a license as an RN subject to probation. On October 2, 2013, the Board filed its answer.

We held a hearing on March 13, 2014. Angela S. Marmion represented the Board. Although notified of the time, place, and date of the hearing, neither Wagner nor anyone representing her appeared. The case became ready for our decision on April 29, 2014, the last date to file a written argument.

¹ The terms “renew” and “reinstate” are used interchangeably in § 335.061.1, RSMo 2000, while § 335.066.1 only refers to “reinstate.” We use the terms interchangeably like § 335.061.1. Statutory references are to RSMo Supp. 2013 unless otherwise noted.

Findings of Fact

1. On February 6, 1997, Wagner was licensed by the Board as an RN. Her license lapsed on April 30, 2005.
2. On March 22, 2010, the Board received a Petition for License Renewal. Wagner's license was reissued on March 25, 2010 and remained current and active through April 18, 2013.
3. Beginning November 7, 2011, Wagner was employed at St. Mary's Health Center as an RN.
4. On January 8, 2013, while on duty, Wagner's employer requested that she submit to a urine drug screen.
5. Wagner's urine sample tested positive for morphine.²
6. Wagner did not have a prescription for morphine. She diverted the morphine from her mother and consumed it.
7. On January 24, 2013, Wagner's employment with St. Mary's Health Center was terminated.
8. On April 12, 2013, Wagner requested that the Board place her license on inactive status.
9. On August 19, 2013, the Board received Wagner's application for renewal.
10. On September 3, 2013, the Board renewed Wagner's license subject to five years' probation.

Conclusions of Law

We have jurisdiction to hear Wagner's complaint because she seeks our review of the decision to issue a probationary license.³ The Board has the burden to prove the basis for imposing probation.⁴ We may alter the terms of probation.⁵

² Morphine is a schedule I controlled substance pursuant to § 195.017.2(3).

³ Section 621.045.

⁴ *Id.*

⁵ *State Bd. of Regis'n for the Healing Arts v. Trueblood*, 368 S.W.3d 259 (Mo. App., W.D. 2012).

Pursuant to §324.038.1, the Board may, in its discretion, issue a license subject to probation for any of the reasons designated as grounds for refusal to reinstate the license under §§335.066.1 and .2. The Board alleges that there is cause to refuse renewal of Wagner’s license, without probation, under § 335.066,⁶ which provides:

1. The board may refuse to issue or reinstate any certificate of registration or authority, permit or license required pursuant to chapter 335 for one or any combination of causes stated in subsection 2 of this section or the board may, as a condition to issuing or reinstating any such permit or license, require a person to submit himself or herself for identification, intervention, treatment, or rehabilitation by the impaired nurse program as provided in section 335.067. The board shall notify the applicant in writing of the reasons for the refusal and shall advise the applicant of his or her right to file a complaint with the administrative hearing commission as provided by chapter 621.

2. The board may cause a complaint to be filed with the administrative hearing commission as provided by chapter 621 against any holder of any certificate of registration or authority, permit or license required by sections 335.011 to 335.096 or any person who has failed to renew or has surrendered his or his certificate of registration or authority, permit or license for any one or any combination of the following causes:

* * *

(1) Use of unlawful possession of any controlled substance, as defined in chapter 195, or alcoholic beverage to an extent that such use impairs a person’s ability to perform the work of any profession licensed or regulated by sections 335.011 to 335.096;

* * *

(6) Misconduct, fraud, misrepresentation, dishonesty, unethical conduct, or unprofessional conduct in the performance of the functions or duties of any profession licensed or regulated by this chapter[;]

* * *

(13) Violation of any professional trust or confidence;

⁶ RSMo Supp. 2007.

* * *

(14) Violation of the drug laws or rules and regulations of this state, any other state or the federal government[.]

* * *

Section 324.041 provides:

For the purpose of determining whether cause for discipline or denial exists under the statutes of any board, commission, or committee within the division of professional registration, any licensee, registrant, permittee, or applicant that tests* positive for a controlled substance, as defined in chapter 195, is presumed to have unlawfully possessed the controlled substance in violation of the drug laws or rules and regulations of this state, any other state, or the federal government unless he or she has a valid prescription for the controlled substance. The burden of proof that the controlled substance was not unlawfully possessed in violation of the drug laws or rules and regulations of this state, any other state, or the federal government is upon the licensee, registrant, permittee, or applicant.

Section 324.038.1 provides:

Whenever a board within or assigned to the division of professional registration, including the division itself when so empowered, may refuse to issue a license for reasons which also served as a basis for filing a complaint with the administrative hearing commission seeking disciplinary action against a holder of a license, the board, as an alternative to refusing to issue a license, may, at its discretion, issue to an applicant a license subject to probation.

Controlled Substances – Subdivisions (1) and (14)

Wagner diverted morphine for her own use. Section 195.202 provides:

Except as authorized by sections 195.005 to 195.425, it is unlawful for any person to possess or have under his control a controlled substance.

Wagner unlawfully possessed the morphine in violation of § 195.202. Such unlawful possession is cause to refuse to renew her license under to §§ 335.066.1 and .2(1) and (14).

Professional Standards – Subdivision (6)

In its complaint, the Board limits its allegations under this subdivision to misconduct and unethical conduct. Therefore, we limit our analysis under this subdivision to these issues.

Misconduct means “the willful doing of an act with a wrongful intention[;] intentional wrongdoing.”⁷ Wagner’s conduct of diverting and consuming a controlled substance for which she did not have a prescription was both wrongful and intentional. She committed misconduct.

Unethical conduct was added to § 335.066.2(6) on August 28, 2013.⁸ All of Wagner’s conduct in this case occurred prior to the addition of unethical conduct to this disciplinary statute. We cannot find discipline for conduct that was not a cause for discipline at the time it was conducted. Accordingly, Wagner may have committed unethical conduct, but this is a cause for discipline that we need not decide in this case.

There is cause to refuse to renew Wagner’s license for misconduct under to §§ 335.066.1 and .2(1) and (6).

Professional Trust – Subdivision (13)

The phrase “professional trust or confidence” is not defined in Chapter 335. Nor has the phrase been defined in case law (which we will discuss below). Absent a statutory definition, the plain meaning of words used in a statute, as found in the dictionary, is typically relied on.⁹ The dictionary definition of “professional” is:

of, relating to, or characteristic of a profession or calling...[;]...
engaged in one of the learned professions or in an occupation
requiring a high level of training and proficiency...[;
and]...characterized or conforming to the technical or ethical
standards of a profession or an occupation....^[10]

⁷*Missouri Bd. for Arch’ts, Prof’l Eng’rs & Land Surv’rs v. Duncan*, No. AR-84-0239 (Mo. Admin. Hearing Comm’n Nov. 15, 1985) at 125, *aff’d*, 744 S.W.2d 524 (Mo. App., E.D. 1988).

⁸ Prior to this date, this provision of the statute was under § 335.066.2(5).

⁹ *E&B Granite, Inc. v. Director of Revenue*, 331 S.W.3d 314, 318 (Mo. banc 2011).

¹⁰ WEBSTER’S THIRD NEW INT’L DICTIONARY UNABRIDGED 1811 (1986).

The dictionary definition of “trust” is:

assured reliance on some person or thing [;] a confident dependence on the character, ability, strength, or truth of someone or something...[.]^{11]}

“Confidence” is a synonym for “trust.”¹² Trust “implies an assured attitude toward another which may rest on blended evidence of experience and more subjective grounds such as knowledge, affection, admiration, respect, or reverence[.]”¹³ Confidence “may indicate a feeling of sureness about another that is based on experience and evidence without strong effect of the subjective[.]”¹⁴ Employers and patients must have an assured reliance that RNs will follow the drug laws of Missouri and the United States. By failing to do so, Wagner broke this assured reliance and violated professional trust. There is cause to refuse to renew her license under § 335.066.2(13).

Probation

The Board was authorized to place Wagner on probation in lieu of denying renewal of her license.¹⁵

Our Discretion

Wagner asserts that the discipline imposed by the Board is excessive. However, she failed to provide evidence of rehabilitation or other reasons to mitigate the severity of the terms, conditions, and duration of the probationary period. Therefore, upon review of the facts, we agree with the Board and uphold its original terms of probation and other requirements.

¹¹ *Id.* at 2456.

¹² *Id.* at 475 and 2456.

¹³ *Id.* at 2456.

¹⁴ *Id.*

¹⁵ Section 324.038.1.

Summary

We renew Wagner's license as an RN under the same terms of probation as issued by the Board in its order of September 3, 2013 under § 335.066.1 and .2(1), (6), (13), and (14).

SO ORDERED on June 4, 2014.

\s\ Sreenivasa Rao Dandamudi
SREENIVASA RAO DANDAMUDI
Commissioner